

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES SCOTT HAMBLETON,

Defendant and Appellant.

C065914

(Super. Ct. No. CM028986)

Defendant James Scott Hambleton was convicted of crimes in both Santa Clara County and Butte County. His sole contention in this appeal is that he is entitled to additional custody credits. We agree. The judgment must be modified.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's appeal involves sentencing on two felony cases, Santa Clara County case No. CC070720 (the Santa Clara County case) and Butte County case No. CM028986 (the Butte County case). The facts of defendant's offenses are not at issue and need not be set forth in this opinion.

On November 27, 2000, defendant was convicted of three counts of abandonment or nonsupport of a child in the Santa Clara County case. (Pen. Code, § 271, subd. (a).)¹ In May 2001, he was granted formal probation.

In July 2008, defendant pled guilty in the Butte County case to possession of a controlled substance, morphine. (Health & Saf. Code, § 11350, subd. (a).) Entry of judgment was deferred and defendant was released to a drug treatment program. (Pen. Code, § 1000.) In January 2010, the deferred entry of judgment was revoked. In March 2010, defendant was placed on Proposition 36 probation. (Pen. Code, § 1210.)

On April 29, 2010, following a probation violation for failing to drug test and failing to appear in court, defendant was sentenced to state prison for three concurrent terms of two years in the Santa Clara County case.

In July 2010, while serving his prison term on the Santa Clara County case, defendant requested that he be sentenced in the Butte County case. (§ 1381.) The court ordered preparation of a probation report.

On August 10, 2010, the trial court in Butte County terminated defendant's Proposition 36 probation and sentenced him as follows on the Santa Clara and Butte County cases: in the Butte County case, to state prison for two years with seven days' custody credit and six days' conduct credit; in the Santa

¹ Undesignated statutory references are to the Penal Code.

Clara County case, to state prison for eight months, to be served consecutively to the term in the Butte County case, with 138 days' custody credit and 138 days' conduct credit.² (Cal. Rules of Court, rule 4.452.)³

Defendant contends, and the Attorney General concedes, that he is entitled to custody credit for state prison time from April 30, 2010 (see fn. 4, *post*) through August 10, 2010. Defendant further contends he is entitled to an additional day of conduct credit in the Butte County case, for a total of seven days of conduct credit, as a result of the 2010 amendment of section 2933. We agree with both contentions.

DISCUSSION

I. Custody Credits for April 29, 2010⁴ through August 10, 2010

Defendant contends, and the Attorney General concedes, that the judgment must be modified to award him credit for state prison time from April 29, 2010 through August 10, 2010,

² Defendant was also sentenced on a misdemeanor case, Butte County case No. CM030149, to county jail for six months, to be served concurrently. The sentencing on that case presents no issues here.

³ Further references to rules are to the California Rules of Court.

⁴ In his opening brief, defendant did not seek credit for April 29, 2010, the date of his sentencing in Santa Clara County. The Attorney General commendably pointed out that defendant was in the custody of the Department of Corrections and Rehabilitation on April 29.

and the abstract of judgment must be amended accordingly. We accept the Attorney General's concession.

From April 29, 2010 to June 29, 2010, a period of 62 days, defendant was held in state prison on the Santa Clara County case. From June 30, 2010 to August 10, 2010, a period of 42 days, defendant was held in Butte County Jail as a state prisoner. These two periods total 104 days. Credit for this time is reflected in the probation officer's report that was prepared for sentencing on August 10, 2010.

At sentencing, the prosecutor persuaded the trial court that defendant had sufficient presentence credit, other than the 104 days here at issue, to satisfy his Santa Clara County sentence, and that the 104 days could only be credited against defendant's parole in the Santa Clara County case.

In November 2010, defendant's appellate counsel filed a *Fares*⁵ request to apply the 104 days to defendant's aggregate term of imprisonment rather than to his Santa Clara County parole. The request was based on a recent *unpublished* opinion from this court. The trial court denied the request.

Rule 4.452 provides in relevant part: "If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case must pronounce a single aggregate term, as defined in

⁵ *People v. Fares* (1993) 16 Cal.App.4th 954.

section 1170.1(a), stating the result of combining the previous and current sentences. In those situations: [¶] (1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed must be combined as though they were all counts in the current case. [¶] (2) The judge in the current case must make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a)."

"The sentence-credit statutes make only one express reference to a sentence modified while in progress,' and that reference is found in section 2900.1. [Citation.] Section 2900.1 provides that '[w]here a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.' . . . [¶] . . . Certainly, a court can be considered to have modified a defendant's original sentence when the court resentsences that defendant to a single aggregate term pursuant to rule 4.452." (*People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012 (*Saibu*).)

Section 2900.5, subdivision (d) provides: "It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall

be contained in the abstract of judgment provided for in Section 1213."

In this case, the trial court properly pronounced a single aggregate term that combined the previous and current sentences. (Rule 4.452.) Because defendant had served 104 days of his Santa Clara County sentence, the trial court had a duty to credit that time upon the "subsequent sentence" defendant "receive[d]" upon the "new commitment for the same criminal act or acts." (§ 2900.1.)⁶ We modify the judgment to award defendant 104 days of state prison credit.⁷

II. Conduct Credit Due Because of the September 2010 Amendment of Section 2933

In the Butte County case, defendant was awarded seven days of presentence custody credit and six days of conduct credit. Defendant contends the judgment must be modified to award him an additional day of conduct credit in the Butte County case. We agree.

On September 28, 2010, as an urgency measure effective on that date, the Legislature enacted Senate Bill No. 76 (2009-2010

⁶ Because defendant was a sentenced prisoner during the 104 days, his custody was not attributable exclusively to the Butte County offenses and he was not entitled to *presentence* credit in addition to the 104 days. (§ 2900.5, subd. (b); *People v. Callahan* (2006) 144 Cal.App.4th 678, 681, 685-686.)

⁷ As defendant acknowledges, his entitlement to *conduct credit* attributable to his 104 days of custody as a sentenced prisoner can be determined only by the Department of Corrections and Rehabilitation. (*Saibu, supra*, 191 Cal.App.4th at p. 1013, fn. 9.)

Reg. Sess.) (Sen. Bill No. 76) (see Stats. 2010, ch. 426), which amended section 2933, regarding presentence conduct credits for defendants sentenced to state prison.⁸ The amendment gives qualifying prisoners one day of presentence conduct credit for each day of actual presentence confinement served (Sen. Bill No. 76, § 1; § 2933, subd. (e)(1), (2), (3)), thereby eliminating the loss of one day of presentence conduct credit under the rate specified by Senate Bill No. 3X 18 (2009-2010 3d Ex. Sess.) (see Stats. 2009, ch. 28, § 50), when the person served an odd number of days in presentence custody. It also eliminates the directive in section 4019 that no presentence conduct days are to be credited for commitments of fewer than four days. (Sen. Bill No. 76, § 1; former § 4019, subd. (g).)

The amendment effective September 28, 2010, which superseded the amendments effective January 25, 2010, does not state it is to be applied prospectively only. Consequently, for the reasons this court has previously concluded the amendments increasing the rate of earning presentence conduct credit effective January 25, 2010, applied retroactively to defendants sentenced prior to that date (see authorities cited in fn. 9, *post*), we similarly conclude the rate provided in former

⁸ Section 2933 was later amended in a manner not pertinent to this appeal. (Stats. 2011, 1st Ex. Sess., ch. 12, § 16, effective September 21, 2011, operative October 1, 2011.)

section 2933 applies retroactively to all appeals pending as of September 28, 2010.⁹

DISPOSITION

The judgment is modified to award defendant an additional day of conduct credit, for a total of seven days' conduct credit, in case No. CM028986, and 104 days' state prison credit. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.

⁹ The California Supreme Court granted review to determine pending appeals. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *In re Kemp* (2011) 192 Cal.App.4th 252, review granted Apr. 13, 2011, S191112.)